Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

IN RE:

UNITED MERCHANTS AND MANUFACTURERS, INC., and VICTORIA CREATIONS, INC.,

Debtors.

FRANKLIN FELDMAN,

Petitioner,

against

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, MICHAEL L. COOK, GEORGE A. ZIMMERMAN, KENNETH J. BIALKIN, AND UZI RUSKIN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

May a court allow a law firm to receive the major portion of its requested legal fee for representing a debtor corporation in the United States Bankruptcy Court when that law firm has failed to disclose serious conflicts of interest, which disclosure is required by the relevant sections of the Bankruptcy Code?

May a court deny reasonable compensation to attorneys who have made a "significant contribution" to the Bankruptcy proceeding as such is defined by the Bankruptcy Code?

PARTIES TO THE PROCEEDING

The parties to this action in the United States Court of Appeals for the Second Circuit were Franklin Feldman; Skadden, Arps, Slate, Meagher & Flom LLP; Michael L. Cook, Kenneth J. Bialkin, George A. Zimmerman; and Uzi Ruskin.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Franklin Feldman, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-entitled proceeding on November 30, 1999.

OPINIONS AND ORDERS BELOW

This petition is from an initial decision of the United States Court of Appeals for the Second Circuit dated September 22, 1999 and is reproduced as Appendix A (App.), at App. 1. On November 30, 1999, the United States Court of Appeals for the Second Circuit denied Petitioner's Petition for Rehearing en banc, reproduced as App. B, at App. 10. The Court of Appeals had affirmed the opinion of District Judge Denny Chin dated January 5, 1999, reproduced as App. C, at App. 12. Judge Chin had affirmed the decision of Bankruptcy Judge Arthur G. Gonzalez dated June 10, 19967 reproduced as App. D, at App. 18.

JURISDICTION

The decision of the United States Court of Appeals denying

petitioner's petition for rehearing en banc was dated November 30, 1999. This petition for writ of certiorari has been timely filed in accordance with Rule 13.3 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257 (a).

FEDERAL QUESTIONS AT ISSUE

There is a conflict in the decisions of the Circuit Courts of Appeals as to whether the Bankruptcy Code requires the forfeiture of all or the substantial part of a law firm's requested legal fee when it has intentionally failed to disclose conflicts it has in representing a Debtor in a bankruptcy proceeding.

There is no significant authority as to the circumstances or criteria applicable to the award of compensation to attorneys who have made a "significant contribution" in a Bankruptcy proceeding.

Article I, Section 8 of the United States Constitution requires that there be "uniform Laws on the subject of Bankruptcies throughout the United States."

INTRODUCTION

The appeal to the United States Court of Appeals arose from the affirmance by District Judge Denny Chin of an order of Bankruptcy Judge Arthur J. Gonzalez denying Petitioner's application for appropriate sanctions against the

law firm of Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") three of its partners (Michael L. Cook ("Cook"), Kenneth J. Bialkin ("Bialkin"), and George A. Zimmerman, and Uzi Ruskin ("Ruskin"), the President and Chief Executive Officer of United Merchants and Manufacturers, Inc. ("United Merchants" or "UM&M") which filed its third Chapter 11 proceeding in February 1996. (the second under Ruskin).

Sanctions were sought against Skadden for (1) the conflict which it had in connection with Petitioner's application for a trustee pursuant to Bankruptcy Code §1104, (2) its failure to disclose the "connections" and conflict it had in representing the debtor United Merchants pursuant to Bankruptcy Rule 2014 (a), (3) its improper use of the Southern District as a venue for the instant bankruptcy filing pursuant to Bankruptcy Code §1408 (28 U.S.C. §1408), (4) its failure to disclose that a Chapter 11 proceeding was then pending in Delaware, and (5) for harassment of Petitioner, a member of the New York Bar. Sanctions were claimed against Ruskin for filing the Chapter 11 Petition in bad faith and causing false and fraudulent documents to be filed in this proceeding.

On September 22, 1999 the Court of Appeals for the Second Circuit entered a Summary Order affirming the decision of Judge Chin. On November 30, 1999 the Second Circuit denied Petitioner's request for a rehearing en banc.

REASONS FOR GRANTING THE WRIT

It is submitted that a writ should be granted because the decision of the Court of Appeals for the Second Circuit (1) conflicts with decisions of other Circuits which have dealt with similar questions of conflict; and (2) presents important questions of federal law with respect to the administration and integrity of the Bankruptcy system of the United States.

ARGUMENT

1. **There Was a Major Conflict by Skadden and its Partners**

The September 22, 1999 Memorandum Decision of the Court of Appeals for the Second Circuit stated that the Bankruptcy Court "granted the motion as to Skadden's conflict." That is inaccurate. Bankruptcy Judge Gonzalez did not grant the motion as to Skadden's conflict. He reduced Skadden's legal fee by $225,000 only for the late disclosure of Bialkin's stock ownership. (See App. D, at App.18.)

There was a major conflict on Skadden's part in opposing Feldman's motion for a Trustee and the removal of Ruskin, as chief executive officer. Bialkin, a senior partner of Skadden had previously (when he was a senior partner at Willkie Farr & Gallagher) represented Ruskin when

Ruskin sought control of United Merchants in 1980 (see Petitioner's Appendix submitted to Court of Appeals at A168, herein "Petit. App. CCA"). Skadden represented Ruskin again in 1989 and 1990 when Ruskin sought to reorganize the company so that he would have majority control. (See Petit. App CCA at A123). This conflict had serious consequences. Ruskin had personally guaranteed a $4 million obligation to United Merchants which was made by a sham corporation owned exclusively by him. At the time of the instant bankruptcy filing and Feldman's motion to remove Ruskin as Chief Executive Officer, the obligation had increased to $6 million (which included $2 million of interest).

The senior associate at Skadden who had the principal responsibility of preparing the papers in this proceeding (Lawrence V. Gelber acknowledged in court that "Mr. Ruskin's position may have been adverse to the position of the corporation". (See Petit. App CCA, A239, at p. 116).

It is respectfully submitted that where a law firm and one of its senior partners has represented the chief executive officer of a corporation who is sought to be removed, there is a most serious conflict. In fact, the New York Court of Appeals in a most recent ruling on July 1, 1999 held that an entire law firm must be disqualified when a young associate (not a partner) moves from one law firm to another and works on a related matter. See Kassis v. Teacher's Insurance and Annuity Association (1999 N.Y. LEXIS 1430). Here, it was a senior partner—not a junior associate—who had represented

the adverse party in a thoroughly related matter. Thus, contrary to the Order of the Second Circuit, we submit that there was a "breach of [a] fiduciary duty."

2. Cook Knew of the Conflict Prior to the Hearing Before Judge Gonzalez and Did Not Disclose It

Cook, the senior bankruptcy partner at Skadden, knew of the prior representation and stock ownership approximately two weeks before Judge Gonzalez was to hear Feldman's motion, but did not notify the Court until three days after the decision. Lawrence V. Gelber, the senior associate at Skadden, testified in Court that he had informed Cook of the information contained in Bialkin's belated disclosure form[1] during the week of May 6, 1996---approximately two weeks before the hearing on May 17, 1996. (See Petit. App. CCA at A239). Cook did not inform the Court until May 20, 1996. *(Id* at A115).

3. The Southern District Was Not a Proper Venue For the Filing of the Instant Chapter 11 Proceeding-and Cook and Skadden Knew It

Under 28 U.S.C. §1408 the proper venue for the commencement of a Chapter 11 proceeding was either the

[1] Gelber testified that Bialkin's disclosure form was lost or "misplaced"and no copy existed. He testified: "I believe I had the only copy of it and I can no longer locate that copy." Cook testified that he never saw the Bialkin disclosure form.

domicile of the entity, where its principal place of business or assets are located, or where a proceeding was pending. United Merchants was a Delaware corporation and had no office or business in New York. Victoria Creations, Inc. (Victoria), the 79% subsidiary of United Merchants, was a Rhode Island corporation and its principal office and assets were located in Rhode Island. Skadden and Cook knew that to be the case. A Chapter 11 proceeding instituted by United Merchants was then "pending" in Delaware and Cook and Skadden knew that. Skadden's argument below that jurisdiction was based on the fact that a petition on behalf of Victoria was filed a few minutes before the United Merchants filing lacks any merit. So does its argument that the "nerve center" of Victoria was in New York. To knowingly claim an improper jurisdictional basis is a fraud on the Court and should be sanctioned. Feldman never waived this point. He raised it when he first became aware of the facts---and indeed the jurisdictional point could not have been waived.

4. There Was a Pending Chapter 11 Proceeding in Delaware and Cook and Skadden Did Not Disclose It When Filing in New York

The petition did not disclose that there was a Chapter 11 proceeding "pending" in Delaware when the New York petition was filed. Cook knew this to be so inasmuch he and Skadden were co-counsel in the Delaware proceeding and Cook signed significant papers in that proceeding.

5. The Testimony of, and Papers Filed by, Ruskin, Cook, and Bialkin Were Clearly False and Under Sections 151, 152 and 3057 of the United States Criminal Code Required the Court to Refer the Matter to a United States Attorney

The conduct of Ruskin, Cook and Bialkin was so egregious in these proceedings as to require that a judge "having reasonable grounds for believing that any violation...relating to insolvent debtors...has been committed...shall report to the appropriate United States attorney all the facts and circumstances of the case..." See 18 U.S.C. § 3057. This was not done.

As for Ruskin: Despite the fact that the independent certified financial statements of UM&M stated that he and his Netherlands Antilles wholly-owned corporation owed UM&M $6 million for the purchase of UM&M stock, Ruskin testified under oath that the transaction was created for his "tax purposes" and that the debt did not exist. He testified that he only had an "option" to acquire the stock---even though he voted it!

Ruskin further testified that UM&M would earn more than $25 million in its first year of operation after confirmation of his Plan in a business in which it had no experience . In fact, UM&M has not produced one penny of revenue---let alone profit---from that business or any other business since Ruskin's testimony in court.

As for Cook: He knew that Bialkin and Skadden had previously represented Ruskin when Ruskin sought control of UM&M, but did not reveal that information until after the Court rendered its decision on Petitioner's motion for a trustee.

Cook knew that at the time of filing the Chapter 11 Petition in New York in February 1996, a Chapter 11 Petition was then "pending" in Delaware and he did not disclose that fact in the Petition (which he signed) or so advise the Court.

As for Bialkin: He knew that an affidavit submitted by him in the 1990 Delaware Chapter 11 proceeding of UM&M conflicted with his belated 1996 affidavit, but offered no explanation of the conflict, or any explanation why it took him and Skadden five months to submit five affidavits with respect to the matter.

6. The Court's Refusal to Disgorge All or Substantially All of the Fees of Skadden on Account of its Conflict is in Conflict with decisions in Other Circuits and in Other Courts Which Have Dealt With a Similar Question

Other Circuits have ruled differently and in stark contrast with the Order in this Court where in a bankruptcy proceeding a conflict on the part of lawyers has been involved.

See, for example:

In re Park-Helena Corp., 63 F. 3d 877 (9th Cir. 1995) ("The disclosure requirements of Rule 2014 are applied as strictly as the requirements of Rule 2016 and section 329...")

In re Crivello, 134 F. 3d 831, 839 (7th Cir. 1998) ("We believe a bankruptcy court should punish a willful failure to disclose the connections required by Fed. R. Bankr. 2014 as severely as an attempt to put forth a fraud on the courts.")

In re Prince, 40 F. 3d 356, 359 (11th Cir. 1994) ("Law firms, no matter their size, must ensure that their representations do not result in irreconcilable conflicts.")

In re Downs, 103 F. 3d 472 (6th Cir. 1996)

Halbert v. Yousif, 225 B.R. 336, 338 (E.D. Mich.. 1998) ("...a complete denial of compensation can be ordered even if disclosure violations innocently resulted from neglect, oversight, or lack of familiarity with bankruptcy requirements")

In re Bolton-Emerson, Inc., 200 B.R. 725 (D. Mass. 1996) ("court may deny all compensation to an attorney as a 'penalty' for failing to avoid a disqualifying conflict of interest")

In re Smitty's Truck Stop., Inc. 210 B.R. 851 (10th Cir. BAP 1997) and In re Cook, 223 B.R. 782, 784 (10th BAP 1998) ("Absent the spontaneous and complete disclosure required by §327 (a) and Rule 2014, court-approved counsel proceed at their own risk")

In re Marine Outlet, Inc., 135 B.R. 154 (Bankr. M.D. Fla. 1991) ("...a failure to comply with the mandate of Bankruptcy Rule 2014 (a) merits a total forfeiture of all fees.")

In re Bonneville Pacific Corp., 196 B.R. 868 (Bankr. D. Utah 1996) (attorney serving conflicting interest "must" be denied all compensation)

In re Leslie Fay Companies, 175 B.R. 525, 533 (Bankr. S.D.N.Y. 1994)

Woods v. City National Bank & Trust Co., 312 U.S, 262, 61 Sup. Ct. 493, 85 L. Ed. 820 (1940) ("Where a claimant, who represented members of the investing public, was serving more than one master or was subject to conflicting interests, he should be denied compensation.")

A particularly apt case is one in which Skadden and Cook were themselves involved where the Chief Bankruptcy Judge in Houston, Texas ruled that Skadden had been acting in the best interests of the principals of the debtor, although purporting to act for the debtor. In that case, the Court

disgorged more than $1,207.000 in legal fees and $226,000 in expenses from Skadden. (See In re Coral Petroleum (83-02460-H-2-5) (Bankr. Houston, Texas) (unpublished) (ten copies of the opinions of the Bankruptcy Court have been lodged with the Clerk of this Court).

Very relevant authorities are the recent decisions taken in the Chapter 11 proceedings involving the New York law firms of Willkie, Farr & Gallagher and Milbank, Tweed, Hadley & McCloy. In In re Granite Partners, L.P., 219 B.R. 22 (Bankr. S.D. N.Y. 1998), the Bankruptcy Court in the Southern District of New York sanctioned the Willkie Farr firm for its conflict and held that it was not entitled to $2,093,700.45 in fees, and a substantial part of its out-of-pocket expenses.

The Milbank Tweed case is more striking. There, in the Milwaukee Chapter 11 Bankruptcy of Bucyrus-Erie Co., the Milbank firm agreed to refund $1.86 million in fees in settlement of a claim that it had a conflicting relationship---and one of its partners was convicted in a criminal trial for misleading the bankruptcy court about the potential conflict!

7. Feldman Was Entitled to a Reasonable Fee for His Substantial Contribution in the Proceedings

The Order of the Court of Appeals states that the bankruptcy court was not clearly erroneous in finding that Feldman's efforts were "wasteful or duplicative." It is

respectfully submitted that this is not the case. No one, other than Feldman, joined in his petition to have Ruskin removed and a trustee appointed. The attorneys for the Unsecured Creditors Committee did not support Feldman's motion---indeed opposed it---and did not examine the charges made with respect to the Guaranty of Ruskin which he refused to perform, nor the more than $6 million obligation ($4 million plus interest) he owed.

In fact, the United States in a filing in the Bankruptcy Court expressly stated that the Supplemental Disclosure Affidavits of Cook and Bialkin were filed after, or in response to, allegations of Feldman (See Petit. App. CCA at A214).[2]

The September 22, 1999 Order of the Court of Appeals states that the Court has not yet had occasion to "articulate the contours of what is a 'substantial contribution' sufficient to render parties eligible for compensation under 11 U.S.C. §503 (b) (3) (D), but we have no need to do so today." We respectfully submit that this case provides an opportunity for the Supreme Court to provide such guidelines to the bar and thereby perform a particularly useful service to those professionals who render service on behalf of clients in bankruptcy proceedings. In this case, Feldman was responsible for the elimination of $225,000 from Skadden's

[2] With respect to the compensation requested by Petitioner, the amount referred to in Judge Chin's decision covered the services of Petitioner and two other lawyers who assisted him in the litigation. As disclosed in Skadden's Fee Application, his hourly rate was lower than the hourly rate charged by Cook and Bialkin in this proceeding.

fees; the elimination of a $500,000 annual employment contract with Ruskin; and bringing to the attention of the Court the serious conflict which Skadden and Bialkin had, as well as the improper filing in New York, all of which represented a substantial contribution. We believe that where a lawyer, essentially acting alone against the largest law firm in the United States, undertakes such efforts and brings to the Court's attention these significant matters, he merits reasonable compensation and this Court should provide some parameters to measure an award.

CONCLUSION

This is not a routine bankruptcy case in which the Court may have limited interest. This case deals with a conflict among the Circuit Courts of Appeals on a fundamental matter and raises important issues as to (a) the responsibility of lawyers in bankruptcy proceedings to disclose significant conflicts and (b) the obligation of Federal courts to deal with lawyers who fail to meet the standards required by applicable statutes and rules. Accordingly, based on the foregoing, a writ should be granted.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 22th day of September, one thousand nine hundred ninety-nine.

PRESENT:
HON.ELLSWORTH VANGRAAFEILAND
HON. GUIDO CALABRESI
HON. ROBERT D. SACK,
Circuit Judges

In re UNITED MERCHANTS AND MANUFACTURERS, INC. and VICTORIA CREATIONS, INC,

Debtors

FRANKLIN FELDMAN,

Appellant,

v.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP, MICHAEL L. COOK, GEORGE A. ZIMMERMAN, KENNETH J. BIALKIN, UZI RUSKIN, OFFICE OF THE UNITED STATES TRUSTEE, ZALKIN, RODIN & GOODMAN, LLP, AND REUNITED HOLDINGS, INC.

Appellees.

SUMMARY ORDER #99-5011

Appeal from the United States District Court for the Southern District of New York (Denny Chin, *Judge*)

UPON DUE CONSIDERATION, it is ORDERED, ADJUDGED, and DECREED that the judgment of the district court be and hereby is AFFIRMED.

For Appellant: STEPHEN H. GARRIN, I. WALTON BADER, Of Counsel, New York, N.Y.

For Appellees: MICHAEL L. COOK, SHMUEL VASSER,

Skadden, Arps, Slate, Meagher & Flom LLP, New York, N.Y. for appellees United Merchants and Manufacturers, Inc., Reunited Holdings, Inc., Skadden, Arps, Slate, Meagher &

Flom LLP, Michael L. Cook, George A Zimmerman & Kenneth J. Bialkin

STEPHEN D. HOFFMAN, Rosen & Reade, LLP, New York, N.Y. for appellee Uzi Ruskin

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Appellant Franklin Feldman appeals from the judgment of the United States District Court for the Southern District of New York (Chin, *Judge*), affirming the decision of the United States Bankruptcy Court for the Southern District of New York (Gonzalez, *Bankruptcy Judge*). On appeal, Feldman challenges the decision of the bankruptcy court to deny his motion for sanctions against appellee Ruskin and appellee Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") and to reject his application for fees and costs. We affirm.

I.

On February 22, 1996, Victoria Creations, Inc. ("VCI") and its parent corporation United Merchants and Manufacturers, Inc. ("UM&M") (collectively, "the Debtors") each filed a Chapter 11 petition for bankruptcy in the Southern District of New York.

In April 1996, appellant Franklin Feldman, ashareholder and former attorney for UM&M, filed a motion seeking appointment of a trustee on the grounds that UM&M had a potential claim against its chief executive, appellee Uzi Ruskin. After a hearing on May 17, 1996, the bankruptcy court denied Feldman's motion.

The Debtors filed proposed reorganization plans in January 1997, and the bankruptcy court scheduled a confirmation hearing for April 9, 1997. In March 1997, Feldman renewed his motion seeking appointment of a trustee. He again alleged that Ruskin had various interests adverse to debtor UM&M. And he also asserted that Skadden, counsel to the debtor, had belatedly disclosed a conflict. Specifically, he contended that one of its partners, appellee Kenneth J. Bialkin, owned stock in UM&M and had, while at another firm, previously represented Ruskin---a party who, in Feldman's view, had an interest adverse to UM&M. The bankruptcy court treated the motion as an objection to the confirmation of the plans.

While this motion was pending, Feldman filed a request for compensation under 11 U.S.C. § 503 (b) (3) (D), (4) (1994 & Supp. 1999 (authorizing compensation for specified parties who have made "substantial contribution[s] to a Chapter 11 proceeding). He sought a total of $350,810 in fees and expenses.

After a full hearing and before ruling on Feldman's

objections and approved the reorganization plans. Feldman did not appeal this decision.

Thereafter, Feldman moved for sanctions against Skadden, three of its partners, and Ruskin.
The grounds for the sanctions motion were that the parties against whom Feldman sought sanctions had allegedly (1) harassed Feldman by threatening him with sanctions in retaliation for his effort to seek compensation from the estate and serving him with a subpoena, (2) knowingly filed the debtors' petition in the Southern District of New York, where venue was improper, and (3) failed to disclose Skadden's conflicts. In his motion. he also emphasized Skadden's putative conflicts, arising from its prior representation and from Bialkin's ownership, during a specified period, of stock in debtor UM&M.

On June 10, 1997, the bankruptcy court denied the sanctions motion as to the harassment and the filing in the Southern District of New York, but granted the motion as to Skadden's conflict. It found that Skadden's alleged threat to seek sanctions was an acceptable basis for questioning the legal basis of Feldman's application for compensation. And it concluded that the subpoena was a procedurally appropriate device to secure appellant's testimony. Because it held that venue was proper, and that Feldman had, in any event, waived any objection to venue, it denied the motion for sanctions based on the filing in that district.

The bankruptcy court did, however, find that Bialkin's ownership of some stock in UM&M during a discrete period disqualified Skadden from serving, during that time, as counsel to the debtor under 11 U.S.C. §327 (a) (1994) (authorizing employment of professionals on behalf of the estate only if they "do not hold or represent an interest adverse to the estate, and...are disinterested persons"). Accordingly, it reduced Skadden's fee award by $225,000. The other potential conflicts raised by Feldman did not, in the court's view, result in an 'adverse interest' that would warrant [Skadden's complete] disqualification.

At the same time, the bankruptcy court rejected Feldman's application for compensation, concluding that appellant had not made substantial contributions to the proceedings and that his activities were instead either wasteful of estate resources or duplicative of efforts by the creditor's committee or the United States States Trustee.

Feldman appealed to the district court, challenging, *inter alia*, the bankruptcy court's decision to deny appellant's application for compensation, to reject his motion for sanctions, and to award some fees to Skadden. The district court affirmed the bankruptcy court. Feldman moved for reconsideration and the court below denied the motion.

On appeal, Feldman argues that the bankruptcy court abused its discretion in denying the motion for sanctions and the application for compensation.

II.

The district court's order affirming the bankruptcy court is "subject to plenary review." *Shugrue v. Air Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc)*, 922 F. 2d 984, 988 (2d Cir. 1990). This court "review[s] conclusions of law *de novo*, and findings of fact under a clearly erroneous standard." *Id.* We review for an abuse of discretion both the decisions of the bankruptcy court regarding sanctions, see *Baker v. Latham Sparrowbush Assoc. (In re Cohoes Indus. Terminal, Inc)*, 931 F. 2d 222, 227 (2d Cir. 1991), and its awards of compensation, *see In re Arlan's Dep't Stores, Inc.*, 615 F. 2d 925, 943 (2d Cir. 1979).

The bankruptcy court declined to impose sanctions on the basis either of the alleged harassment or of the claimed improper filing in the Southern District. The bankruptcy court expressly found legitimate explanations for the conduct that Feldman deemed harassment and it also correctly determined that venue was proper in the Southern District. Accordingly, appellant's challenge to these rulings is without merit.

The bankruptcy court did, however, sanction Skadden in the amount of $225,000 for the belated disclosure of Bialkin's ownership of stock in UM&M. It did not, to Feldman's dismay, deny all fees to Skadden or impose sanctions for the firm's other potential conflicts. Although the bankruptcy code requires that professionals retained for the estate be "disinterested," *see* 11 U.S.C. §327 (a), it also

acknowledges that compensation who are *not* disinterested may be appropriate in some circumstances. This is evidenced in the permissive language of 11 U.S.C. §328 (c), which provides that "the court *may* deny [fees and costs]...if, at any time...such professional person is not a disinterested person." Id. (emphasis added). "There is no doubt of the inherent power of a bankruptcy judge to deny fees and disbursements where serious breaches of fiduciary obligations occur." I*n re Arlan's Dep't Stores, Inc.*, 615 F. 2d at 943. But where, as here, (a) there was no finding of a breach of any fiduciary duty and (b) the actual sanction imposed reduced Skadden's total fees by 16% and its fees for the period prior to the late disclosure by 50% from the amount sought in its fee application, we cannot say that the bankruptcy court abused its discretion in declining to deny all compensation.

We likewise cannot say that the bankruptcy court erred in refusing to award Feldman compensation. We have not yet had occasion to articulate the contours of what is a "substantial contribution" sufficient to render parties eligible for compensation under 11 U.S.C. §503 (b) (3) (D), but we have no need to do so today. The bankruptcy court was not clearly erroneous in finding that the activities for which Feldman sought compensation were either wasteful or duplicative. Activities that retard and interrupt cannot be said to have substantially contributed to a Chapter 11 proceeding.

III.

Having reviewed all of plaintiff's claims and having found them to be without merit, we AFFIRM the judgment of the district court granting summary judgment for defendants.

For the Court,
KAREN GREVE MILTON
ACTING CLERK

BY:
/s/ RALPH A. ANDERSON, Deputy Clerk
ACTING OPERATIONS MANAGER

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 30 day of November one thousand nine hundred and ninety-nine

In re: UNITED MERCHANTS AND MANUFACTURERS,INC. and VICTORIA CREATIONS, INC.
Debtors.

Dkt. No-99-5011

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Frank [sic] Feldman.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED,

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

KAREN GREVE MILTON, Acting Clerk

BY: /s/Beth J. Meador, Administrative Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re
UNITED MERCHANTS AND MANUFACTURERS, INC. and VICTORIA CREATIONS, INC.,

---

FRANKLIN FELDMAN

Appellant,

-against-

UNITED MERCHANTS AND MANUFACTURERS, INC., et al.

Appellees.

MEMORANDUM DECISION
97 Civ. 5437 (DC)

CHIN, D.J.

In this bankruptcy case, appellant Franklin Feldman appeals from two orders of the United States Bankruptcy Court for the Southern District of New York (Arthur J. Gonzalez, Bankruptcy Judge) entered on June 19, 1997. Feldman, an attorney and a shareholder of the debtor United Merchants and Manufacturers, Inc. ("UM&M"), participated in the bankruptcy proceedings below.

Feldman challenges four aspects of the Bankruptcy

Court's rulings on this appeal: (1) its award of fees to Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"), counsel for UM&M and debtor Victoria Creations, Inc. ("Victoria"); (2) its award of fees to Zalkin, Rodin & Goodman LLP ("ZR&G"), counsel for the Committee of Unsecured Creditors; (3) its denial of an application by Feldman (and two colleagues) for a "substantial contribution" award of fees and costs; and (4) its denial of Feldman's application for sanctions against Skadden, three of its partners, and Uzi Ruskin (the chief executive officer of the debtors).

The Bankruptcy Court's findings of fact are subject to a clearly erroneous standard of review its legal conclusions are reviewed de novo; and its decisions to award or deny fees and sanctions are subject to an abuse of discretion standard. See Momentum Mfg. Corp. v. Employee Creditors Comm. (In re Momentum Mfg. Corp.), 25 F. 3d 1132, 1136 (2d Cir. 1994) ("The bankruptcy court's legal conclusions are evaluated de novo; its findings of fact are subject to a clearly erroneous standard.") Cooter & Gell v. Hartmarz Corp., 496 384, 405 (1990) (Rule 11 sanctions subject to abuse of discretion standard of review); Zeisler & Zeisler v. Prudential Ins. Co. (In re JLM, Inc.), 210 B.R. 19, 23 (B.A.P. 2d Cir. 1997) (fee award subject to abuse of discretion standard of review).

1. Skadden's Fee Award

Skadden filed three fee applications in the Bankruptcy Court. The Bankruptcy Court reduced the firm's fee by

$225,000 which was approximately 16% of the total fees sought. The Bankruptcy Court did so after conducting an evidentiary hearing (in which Feldman participated) on the U.S. Trustee's objection to the firm's first interim fee application. The U.S. Trustee had asked the Bankruptcy Court to consider two issues: (a) the ownership by a Skadden partner (Kenneth J. Bialkin) of some 37,000 shares of UM&M stock, and (b) Bialkin's representation, while a partner at a different law [sic], of Ruskin some 16 years earlier. These matters were disclosed by Skadden, but some three months after they should have been. In addition, Skadden had represented Ruskin on unrelated matters in 1989, at a time when Skadden was not representing UM&M or Victoria.

After the hearing, the Bankruptcy Court reduced Skadden's fees by $225,000 because of the late disclosure. The U.S. Trustee---who had lodged the initial objection---did not appeal.

The Bankruptcy Court did not abuse its discretion in awarding fees to Skadden with a $225,000 reduction for the late disclosure. While there can be no dispute that Skadden should have made the disclosure earlier, no party ever moved to disqualify Skadden as counsel for the debtors, even after the disclosure was made. Skadden continued to represent the debtors for more than a year after the disclosure.Moreover, the potential conflicts were not significant ones. The 37,000 shares represented less than 1% of UM&M's stock and had

little, if any, value; they were eventually donated to charity. Bialkin's representation of Ruskin occurred in 1980, 16 years earlier, when he was a member of another law [sic]. Skadden's representation of Ruskin occurred in 1989, at a time when it was not representing UM&M, on matters having nothing to do with the bankruptcy. These were not matters of great moment, and at the conclusion of the evidentiary hearing, the assistant U.S. Trustee stated his belief that the belated disclosure "was nothing more than an oversight." (A. 618). (fn: Reference to "A." are to appendix to the brief submitted by Skadden.)

Judge Gonzalez presided over the bankruptcy proceedings for more than a year and a half. He was familiar with the quality of Skadden's work. He heard the testimony of the witnesses, including the Skadden partners, and he was in the best position to evaluate their explanations. The $225,000 reduction represented a 16% reduction of Skadden's total fee application and a 50% reduction of its fees for the period prior to the late disclosure. Judge Gonzalez acted well within his discretion in granting Skadden's application for fees with a $225,000 reduction for the late disclosure. Accordingly, the Bankruptcy Court's decision in this respect is affirmed.

2. ZR&G's Fee Award

I have considered Feldman's arguments with respect to the Bankruptcy Court's award of fees to ZR&G. The arguments are meritless. Accordingly, the Bankruptcy Court's award of fees to ZR&G is affirmed.

3. The Denial of Feldman's Application for Compensation

In the Bankruptcy Court, Feldman applied pursuant to 11 U.S.C. § 503 (b) for $349,575 in fees and $1,235 in costs. He sought compensation for 480 hours, at an hourly rate of $450, with a contingency bonus of 50%. He also sought compensation for two other attorneys who assisted him. The Bankruptcy Court conducted a hearing and denied the application on June 10, 1997.

Section 503 (b) (3) (D) permits a court to allow a creditor or stockholder an administrative claim for "actual, necessary expenses...incurred...in making a substantial contribution in a case under chapter 9 or 11 of this title." An applicant for a "substantial contribution" award of compensation must demonstrate that he or she has confer[red] a significant and demonstrable benefit upon the reorganization process." In re Best Prods. Co., 173 B.R. 862, 866 (Bankr. S. D. N.Y. 1994). A substantial contribution award is made only for "extraordinary creditor actions," on "those rare occasions when the creditor's involvement truly fosters and enhances the administration of the estate." Id.

Here, the Bankruptcy Court found not only that Feldman and his colleagues had failed to make "a direct, significant, and substantial benefit to the estate," but that many of Mr. Feldman's efforts...caused an increase in the fees incurred" by the debtors and the Committee. (A.966). The Bankruptcy Court concluded that some of Feldman's efforts were duplicative of the efforts of the Committee and the U.S.

Trustee, and that any benefit his efforts did confer on the estate were not "sufficiently significant" to warrant an award under section 503 (b) (A. 966-67).

The Bankruptcy Court's factual findings were not clearly erroneous; it applied the correct legal standards; and it did not abuse its discretion in concluding that Feldman and his colleagues were not entitled to any compensation. Its decision in this respect is affirmed.

4. The Denial of Feldman's Application for Sanctions

In the Bankruptcy Court, Feldman moved for sanctions against Skadden, three of its partners, and Ruskin. The Bankruptcy Court denied the motions on June 10, 1997.

Feldman's arguments on appeal are completely without merit. The Bankruptcy Court's decision not to impose sanctions was well within its discretion and is therefore affirmed.

CONCLUSION

The Bankruptcy Court's orders are affirmed in all respects, with costs.

SO ORDERED

Dated: New York, New York
January 5, 1999

/s/ DENNY CHIN
United States District Judge

APPENDIX D

[Ruling of Bankruptcy Judge Arthur J. Gonzalez at Hearing Held on June 10, 1997] (pp. 65-73 of Transcript)

THE COURT: That resolves the initial stage of the fees.

Next I will move to the sanctions issue with respect to Skadden, Arps in which the hearing was held a number of months ago. It will take about ten minutes to read into the record. I am going to take a five minute break. Then I will be back.

(Whereupon, at this point in the proceedings there was a recess, after which the proceedings continued as follows:)

THE COURT: After reviewing the pleadings in this matter and having presided over an evidentiary hearing and having heard oral argument in support and opposition to the objections to the fees and expenses sought by Skadden, Arps, Debtor's counsel, the Court finds that relief is plainly warranted for nondisclosure and pursuant to 328 of the Code, which permits the Court to deny fees and reimbursement of expenses of a professional person retained pursuant to Section 327 (a) if at any time during that employment the professional person is not disinterested or holds an adverse interest to the interest of the estate with respect to the matter in which the professional person is employed, The Leslie Fay Companies, Inc., et al., 175 B.R. 575 (1994)

There are two issues that need to be addressed

regarding the retention issue: (1) Skadden's failure to comply with the disclosure requirements set forth in Federal Rule of Bankruptcy Procedure 2014; and (2) whether Skadden was qualified to be retained as Debtor's counsel pursuant to Section 327 (a).

There is no dispute that Skadden failed to comply with the disclosure requirements. Nor is there any dispute that Skadden did not literally meet all the requirements of Section 327 (a).

There is, however, a dispute as to whether Skadden's failure to comply with 327 (a) is limited to the issue of its partner, Kenneth Bialkin's stock ownership in UM&M, which ownership would disqualify Skadden under the definition of disinterestedness in Section 101 (14) (A) or whether such ownership and other contacts between UM&M and Uzi Ruskin, on the one hand, rendered Skadden and Mr. Bialkin, on the other hand, rendered Skadden not qualified under 327 (a) because this relationship resulted in Skadden having an adverse interest, as such as defined in 101 (14) (E) [sic] or in the second prong of 327 (a).

The Court finds that but for Mr. Bialkin's stock ownership in UM&M, Skadden's connections would not have disqualified it from being Debtor's counsel under Section 327 (a).

Had Skadden revealed Mr. Bialkin's stock ownership,

as they had done in the affidavit of disinterestedness filed in 1990 for the filing of UM&M in Delaware, this Court would not have approved the retention until the disabling issue of the stock ownership was resolved by a disposition of the stock and at that point would have approved their retention.

Throughout this case, the Debtor maintained that the UM&M stock was worthless. Nonetheless, ownership of its stock the definition of disinterestedness resulting in an inability to be retained under 327 (a), in the view of this Court.

Having found that Skadden was not disinterested and therefore not qualified to serve as Debtor's counsel during the period of time Mr. Bialkin held the stock of UM&M, the Court must determine what sanction would be appropriate under the circumstances. Sanctions could range from disqualifying Skadden for the entire case, or some portion thereof, or imposing an economic sanction.

Mr. Feldman argues for disqualification and a disallowance of all fees, the United States Trustee does not contend that Skadden would have been rendered not disinterested but for the stock ownership issue, and argues for an economic sanction in the amount of the fees and expenses incurred during the period Skadden was not qualified to be Debtor's counsel. The Committee has not taken a position regarding this issue.

I divert from reading this and ask Committee's counsel that is what my records indicate. Is that accurate?

MR GOTTFRIED: That's accurate, Your Honor.

THE COURT: Thank you.

Based upon the record before me, including the various pleadings and the hearings held in this matter, the Court finds disqualification, either in whole or in part, of Skadden not warranted. However, the Court finds that an economic sanction is warranted.

With respect to the economic sanction, as stated in above, relief is plainly warranted for nondisclosure and pursuant to 328 of the Code, which permits the Court to deny reimbursement of expenses of a professional person at any time during the employment of its professional person is not disinterested or holds an adverse interest to the interest of the estate with respect to the matter in which the professional is employed.

In making my determination as to the appropriate economic sanction I have considered, among other things, the following:

prior to the preparation of Skadden's initial affidavit of disinterestedness, it did not obtain and review a copy of the affidavit of disinterestedness filed in Delaware in

1990 regarding Skadden and its connections with UM&M;

although a comprehensive disclosure questionnaire was sent throughout the firm, Skadden did not sufficiently enforce compliance regarding its prompt return;

failure to follow up on returning of the questionnaire was compounded by the fact that one of the questionnaires that were not returned was Mr. Bialkin's, a partner who had a great deal of contact with the Debtor throughout its relationship with Skadden;

the fact that it took in excess of forty-five days for Mr. Bialkin to dispose of the stock once he became aware of the necessity to do so;

the fact that the senior associate and partner in charge of the bankruptcy matter immediately took steps to make the appropriate disclosure when such matters came to their attention;

although the connections revealed in the various amended affidavits did not result in "an adverse interest" that would warrant disqualification, the delay in the disclosure of those connections prevented the parties in interest and the Court from making an informed review of the retention application at the outset of the case;

the fact that five affidavits were filed in this case,

where had proper procedures been followed and enforced, the initial affidavit would have contained all relevant information;

the amount of fees sought by Skadden is $1,409,259.80 and expenses of $130,968.63;

the approximate amount of fees incurred during the period during which Skadden was disqualified to serve as counsel to the Debtor was $750,000 and expenses of $75,000;

the approximate amount of fees incurred prior to the disclosure of Mr. Bialkin's stock ownership was $425,000 and expenses of $50,000.

Just to put those two comments in perspective. The total fees during the period in which Skadden was not disinterested pursuant to the disinterested definition of 101 (14) (A) was $725,000. Within that period approximately $425,000 was incurred prior to the disclosure of Mr. Bialkin's stock ownership. So the total number of that period is $725,000. The portion of that period in which there was no disclosure was fees incurred during that portion of $425,000.

The fees incurred by the Committee regarding the disinterestedness issue; and

the importance of disclosure of the disclosure process to the integrity of the system and the need for vigilant enforcement.

Therefore, based on the foregoing, the Court finds that an economic sanction is appropriate, and based upon the

aforementioned considerations the amount of the sanction is $225,000, which will be used as a figure to reduce the amount awarded Skadden, Arps as previously found by this Court,

Skadden can settle an Order regarding the entire fee issue, the awards and the amount of the sanctions, and submit that to the Court.

I believe that resolves all issues before me today.

APPENDIX E

§ 327 (a) of the Bankruptcy Code (11 U.S.C. §327 (a))

§327. Employment of professional persons

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

APPENDIX F

§503 (b) (3) (D) and (4) of the Bankruptcy Code
(11 U.S.C. §503 (b) (3) (D) and (4))

§ 503. Allowance of administrative expenses

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including--

****

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by---

****

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title; or

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

APPENDIX G

Bankruptcy Rule 2014 (a)

(a) Application for an Order of Employment. An order approving the employment of attorneys, accountants, appraisers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

APPENDIX H

28 U.S.C. §1408

§ 1408. Venue of cases under Title 11

Except as provided in section 1410 of this title, a case under title 11 may be commenced in the district court for the district--

(1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States or principal assets in the United States, of such person were located in any other district; or

(2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.

Supreme Court, U.S.
FILED
MAY 3 - 2000
CLERK

No. 99-1595

IN THE

Supreme Court of the United States

FRANKLIN FELDMAN,

Petitioner,

v.

UNITED MERCHANTS AND MANUFACTURERS, INC., REUNITED HOLDINGS, INC., SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, MICHAEL L. COOK, GEORGE A. ZIMMERMAN, KENNETH J. BIALKIN, AND UZI RUSKIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Petitioner omitted United Merchants and Manufacturers, Inc. and Reunited Holdings, Inc. fka Victoria Creations, Inc. (collectively, the "Debtors"), from his statement of the parties to the proceedings below.

Respondent United Merchants and Manufacturers, Inc. ("UM&M") has no parent corporations and no publicly held company owns 10% or more of UM&M stock.

Respondent Reunited Holdings, Inc. ("RHI") is a subsidiary of UM&M and other than UM&M, no publicly held company owns 10% or more of RHI's stock.

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BASIS OF JURISDICTION

The United States Court of Appeals for the Second Circuit denied the Petitioner's appeal on September 22, 1999, and on November 30, 1999, denied the Petitioner's "Suggestion for Rehearing En Banc."

This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Issue Number 1

11 U.S.C. § 328(c):

> Except as provided in section 327(c), 327(e), or 1107((b) of this title, the court may deny allowance of compensation for services and reimbursement of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

Issue Number 2

11 U.S.C. §§ 503(b)(3)(D), (4):

> After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including-(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by-(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making substantial contribution in a case under chapter 9 or 11 of this title . . . (4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant.

STATEMENT OF THE CASE

Venue — Southern District of New York. On February 22, 1996 (the "Petition Date"), the Debtors commenced these cases by filing petitions for relief in the bankruptcy court under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code" or "Code"). RHI, a subsidiary of

UM&M with its principal place of business in New York, AA[1] 308-09 (¶ 4), filed its petition first. UM&M, a Delaware corporation, then filed its petition. AA 323 (¶ 2).

Feldman's Unsuccessful Trustee Motion. Feldman, a UM&M shareholder and former attorney for UM&M, moved for the appointment of a trustee or an examiner in April, 1996, alleging that Ruskin, then UM&M's chief executive, failed to pay on his guaranty of the purchase of UM&M stock by Monzoral N.V.; that the board of directors acted improperly regarding the guaranty; that the existence of the guaranty had never been disclosed to shareholders; and that UM&M refused to sue on the guaranty. FA[2] 17-23. The court denied the motion on May 17, 1996, FA 170. Feldman never appealed from the denial of his motion.

Feldman's Unsuccessful Objection to Confirmation of the Debtors' Reorganization Plans. The Debtors filed their reorganization plans with disclosure statements (the "Disclosure Statements") on January 21, 1997. By order dated February 25, 1997, the court approved the amended Disclosure Statements over Feldman's objection, and scheduled a confirmation hearing on the Debtors' proposed reorganization plans (the "Plans") for April 9, 1997.

Feldman renewed his motion for the appointment of a trustee a year later, on March 24, 1997, alleging that Skadden had a conflict of interest due to Bialkin's ownership of UM&M stock (which had virtually no value) and prior

1. "AA" refers to Respondents-Appellees' appendix in the Second Circuit Court of Appeals.

2. "FA" refers to Petitioner-Feldman's appendix in the Second Circuit Court of Appeals.

representation of Ruskin; UM&M's interests were not properly represented; claims against the UM&M board should be prosecuted; and, based on the potential recovery from such litigation, the reorganization plan for UM&M should not be confirmed. FA 241-47. The court treated Feldman's renewed motion as an objection to confirmation of the Plans, with Feldman's apparent consent. FA 240 at 235. Feldman was the only objecting party to appear.[3]

After a full trial on April 9, 1997, the court overruled Feldman's objections and confirmed the Plans. AA 603-669. Neither Feldman nor any other party appealed from the court's two confirmation orders, which are now final and no longer subject to review.

Feldman's Fee Motion. Feldman filed a request for compensation under 11 U.S.C. §§ 503(b)(3), (4) on March 26, 1997, FA 276-92, seeking an award of $350,810 ($349,575 in fees and $1,235 in expenses) (the "Fee Motion"). The Debtors objected on May 7, 1997 to Feldman's Fee Motion, FA 293-306, as did the official committee of unsecured creditors ("Committee") and the United States Trustee ("U.S. Trustee"). AA 1072-73. At the hearing held on June 10, 1997, the bankruptcy court denied Feldman's Fee Motion, finding that he had made no contribution to the case, and entered an order on June 18, 1997. FA 307.

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3. The objections of the United States Trustee and the IRS were resolved prior to the confirmation hearing. AA 773. In addition, six former UM&M shareholders sent the court letters objecting to confirmation due to the Plan's cancellation of their stock, although the insolvency of UM&M had been undisputed at all times. AA 742.

Feldman's Sanctions Motion. Feldman also moved on May 16, 1997, for sanctions (the "Sanctions Motion") against Skadden, three of its partners, and Uzi Ruskin, the Debtors' chief executive officer. FA 337-53. Because he had failed to appeal from the April 10, 1997 order confirming the UM&M reorganization plan, Feldman also asked the court to revoke its April 10, 1997 confirmation order. *Id.* The Debtors, Ruskin and Skadden responded to Feldman's motion on June 6, 1997. AA 177.

The Final Fee Hearing. The hearing on all professional fee applications was also held on June 10, 1997. The bankruptcy court reduced Skadden's requested fees of $1.4 million by $225,000 because of the firm's inadvertent, belated disclosure of a Skadden partner's ownership of a *de minimis* amount (less than one-fifth of 1%, FA 116 ¶ 4) of worthless UM&M stock (FA 119 ¶ 5; FA 121-22 ¶¶ 2,3).[4]

No party, including Feldman, had ever moved to disqualify Skadden as counsel to the Debtors, either before or after the disclosure of Bialkin's ownership of UM&M stock in May, 1996. FA 116 (¶ 4). Based on the belated disclosure, the U.S. Trustee filed a limited objection to Skadden's first interim fee application in September, 1996. FA 214-25. An evidentiary hearing was held on March 20 (FA 239), and April 1, 1997 (FA 240), in which Bialkin and two other witnesses testified.

The bankruptcy court found no conflict of interest on Skadden's part, but reduced Skadden's fee award by the sum

4. The Skadden partner, Bialkin, had returned a completed firm-wide questionnaire with the appropriate disclosure of his stock ownership approximately 2½ months late. FA 239 at 109; FA 240 at 161-64. At the time, Skadden had approximately 1,100 attorneys in 9 domestic and 12 international offices. FA 116 n.1.

of $225,000 solely because of the firm's belated disclosure, which the U.S. Trustee called an "oversight". FA 240 at 248.

REASONS FOR DENYING THE WRIT

I. The Record Does Not Raise the Questions Presented by Petitioner.

As to Issue No. 1, there were no "serious conflicts of interest" on Skadden's part. The bankruptcy court has held that, notwithstanding Petitioner's other alleged conflicts, Bialkin's ownership of UM&M stock was the sole disqualifying conflict. Pet.App.19. It is undisputed that this conflict was anything but a serious one, as Bialkin owned less than one-fifth of 1% of worthless UM&M stock, which was eventually donated to charity. Pet.App.15.

As to Issue No. 2, the bankruptcy court held that the Petitioner not only failed to have made a "substantial contribution," but in fact harmed the reorganization process and the estates.

II. Legal Grounds for Denial of Writ.

Issue No. 1.

(i) Code § 328(c) is clear and unambiguous in stating that the bankruptcy court "*may* deny allowance of compensation" to interested counsel; the statute says "may," not "shall." Thus, the lower courts were correct in affirming the bankruptcy judge's discretion to deny Skadden a portion, rather than its entire fee.

(ii) There is no disagreement among the Circuit Courts of Appeals with respect to the application of section 328(c).

(iii) Even the denial of only a portion of Skadden's fee was unjustified because Skadden qualified as disinterested counsel.

Issue No. 2.

The bankruptcy court held that the Petitioner did not make a "substantial contribution" to the Debtors' cases. This factual determination is clearly correct.

ARGUMENT

I.

SKADDEN'S FEES

A. Section 328(c)

(i) *Section 328(c) is Unambiguous.*

Section 328(c) allows bankruptcy courts discretion in denying compensation. The statute provides that the court "may" deny compensation, rather than that the court "shall" or "must" deny compensation. As this Court stressed repeatedly, statutes say what they mean, and mean what they say. When the statute is clear and unambiguous on its face, judicial inquiry is at end. The literal words of the statute should be respected. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then . . . 'judicial inquiry is complete.' ") (interpreting statute granting

jurisdiction of bankruptcy appeals) (citations omitted); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' ") (interpreting Code § 506(b)) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)); *accord Union Bank v. Wolas*, 502 U.S. 151, 157-58 (1991) (enforcing the plain meaning of section 547(c)(2) of the Bankruptcy Code); *Toibb v. Radloff*, 501 U.S. 157, 162 (1991) (enforcing the plain meaning of section 109 of the Bankruptcy Code).

The ordinary use of the term "may" is clearly permissive, *Farmers' & Merchants' Bank v. Federal Reserve Bank*, 262 U.S. 649, 662-63 (1923); *Rasbury v. IRS* (*In re Rasbury*), 24 F.3d 159, 166 (11th Cir. 1994); *International Cablevision, Inc. v. Sykes*, 997 F.2d 998, 1005 (2d Cir. 1993), and that is especially so when the statute under consideration maintains the distinction between "may" and "shall." *Farmers' & Merchants'*, 262 U.S. at 663. The Bankruptcy Code clearly maintains this distinction. *Compare*, 11 U.S.C. § 321(a) (may); § 326(a), (d) (may); § 327(a), (b), (d), (e) (may); § 328(a), (b), (c) (may); § 330(a)(1) (may) *with* § 321(b) (may not); § 326(b), (c) (may not); § 327(f) (may not); § 329(a) (shall); § 330(a)(4) (shall not); § 330(a)(5), (6) (shall).

(ii) *All Circuits Courts Agree on the Proper Interpretation of Section 328(c).*

Like the Second Circuit below, all Circuit Courts of Appeals that have addressed the proper application of section 328(c) agree that the section allows bankruptcy courts discretion to deny all or a portion of the requested fees. Petitioner fails to cite a single Circuit Court of Appeals

decision construing section 328(c) as mandatory rather than permissive. *Kravit, Gass & Weber v. Michel* (*In re Crivello*), 134 F.3d 831, 837-39 (7th Cir. 1998) ("Being on the front line, a bankruptcy judge is 'in the best position to gauge the ongoing interplay of factors and to make the delicate judgment calls which such a decision entails'. Section 328(c) requires this discretion in deciding whether the court should deny in whole or in part the fee request of an erroneously employed professional."); *Law Offices of Nicholas A. Franke v. Tiffany* (*In re Lewis*), 113 F.3d 1040, 1043 (9th Cir. 1997) (attorney's fee award reviewed for abuse of discretion);[5] *Electro-Wire Prods., Inc. v. Sirote & Permutt, P.C.* (*In re Prince*), 40 F.3d 356, 360 (11th Cir. 1994) ("The permissive nature of the language in § 328(c) is clear."); *Gray v. English*, 30 F.3d 1319, 1324 (10th Cir. 1994) ("The permissive 'may deny' language does not require the court to deny legal fees or disgorge previously paid fees in all cases."); *Rome v. Braunstein*, 19 F.3d 54, 62 (1st Cir. 1994) ("Like other courts which have considered the issue, however, we adopt no per se or brightline rule invariably requiring denial of all compensation under section 328(c).").

Michel v. Federated Dep't Stores, Inc. (*In re Federated Dep't Stores, Inc.*), 44 F.3d 1310 (6th Cir. 1995) did not deal with the proper interpretation of section 328(c), and, therefore, does not establish a conflict among the circuits. Unlike the case at hand, in *Federated*, the United States Trustee opposed the professional's retention at the bankruptcy court level, and appealed the retention order to

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5. *Accord Hill & Sandford v. Mirzai* (In re Mirzai), 203 F.3d 832 (9th Cir. 1999) (Table), 1999 WL 1073820 at *2 ("We grant broad discretion to bankruptcy court determinations to deny or award fees where a debtor's attorney has failed to disclose material facts."). Petitioner filed with the Court copies of this unpublished disposition.

the district court and to the Circuit Court of Appeals. 44 F.3d at 1312. After the Sixth Circuit reversed the order of retention, it held that a professional who was not retained should be denied compensation.[6] *See* 44 F.3d at 1319 ("Our authority to award fees is circumscribed by 11 U.S.C. § 330(a), which provides that 'the court may award [reasonable fees and expenses] . . . to a person employed under [§] 327. . . .' We have already decided that Lehman Brothers' appointment was invalid and, therefore, Lehman Brothers was not a person employed under § 327(a)."). Because Lehman acted with no valid order of retention, the Sixth Circuit did not have to reach the proper interpretation of section 328(c). In the case at hand, however, Skadden's retention order was never appealed, and no party, including the Petitioner, has moved to disqualify Skadden as Debtors' counsel. Thus, unlike *Federated*, Skadden's retention order is final and not subject to appeal.

(iii) *Legislative History Supports the Respondents.*

"[E]ven if we could resort to legislative history it favors the permissive construction. *See* Sen. Rep. No. 95-989, 1978 U.S. Code Cong. & Admin. News 5787, 5825 ('Subsection (c) [of § 328] permits the court to deny compensation. . . if the professional person is not disinterested.')." *Gray*, 30 F.3d at 1323-24.

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6. Even the *Federated* court used its equitable powers to award Lehman Brothers a portion of its requested compensation. *See* 44 F.3d at 1320.

B. Skadden Qualified As Disinterested Counsel

(i) *Bialkin's De Minimis Stock Ownership Was Not a Conflict.*

Bialkin's ownership of 1/5 of 1% of worthless UM&M stock does not render Skadden interested.[7] A single attorney's disqualifying interest, does not disqualify the entire firm. *United States Trustee v. S.S. Retail Stores Corp.* (*In re S.S. Retail Stores Corp.*), 211 B.R. 699, 703-04 (Bankr. 9th Cir. 1997) ("Congress had the opportunity to include this blanket disqualification provision in section 327 and did not do so. . . . No vicarious disqualification is provided for in the applicable sections of the Bankruptcy Code, despite the legislative opportunity to include [it]."); *Vergos v. Timber Creek, Inc.*, 200 B.R. 624, 629-30 (W.D. Tenn. 1996); *Capen Wholesale, Inc. v. Michel* (*In re Capen Wholesale, Inc.*), 184 B.R. 547, 550 (N.D. Ill. 1995); *In re Creative Restaurant Management, Inc.*, 139 B.R. 902, 911-14 (Bankr. W.D. Mo. 1992).

(ii) *Bialkin's and Skadden's Representation of Ruskin in 1980 and 1989 Does not Disqualify Skadden.*

As a matter of federal bankruptcy law, Skadden's or Bialkin's prior representation of Ruskin in matters completely unrelated to the bankruptcy cases does not disqualify Skadden from representing the Debtors. *Bank Brussels Lambert v. Coan* (*In re Arochem Corp.*), 176 F.3d 610, 624 (2d Cir. 1999) ("The Bankruptcy Code thus

7. The Bankruptcy Court disagreed with Skadden on this point, and Skadden did not appeal. The issue is addressed herein, however, to allow the Court to judge in context the severity of the sanction imposed on Skadden.

recognizes a distinction between past and present representation. Because Caddell no longer 'represents' Wells, Caddell does not represent any of Wells' interests, whether or not any of those interests might be adverse to the estate."). Skadden's prior limited representation of Ruskin in 1989 and Bialkin's representation of Ruskin in 1980, never created a conflict or an adverse interest in the later 1996 bankruptcy case. *St. Angelo v. Sidco, Inc.* (*In re Sidco, Inc.*), 173 B.R. 194, 195-96 (E.D. Cal. 1994) (attorney properly retained although he previously represented a person who was the secretary, 90% shareholder, guarantor, co-debtor and unsecured creditor of the debtor).

This result does not change when applying non-bankruptcy rules. A law firm may represent one client in a litigation[8] against a former client when the subject matter of the current and *former* representation are not substantially related. *Allegaert v. Perot*, 565 F.2d 246, 248 n.3 (2d Cir. 1977); *Lightning Park, Inc. v. Wise Lerman & Katz, P.C.*, 609 N.Y.S.2d 904, 906 (1st Dep't 1994). Courts inquire as to whether there is a "substantial relationship" between the two matters. *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746, 749 (2d Cir. 1981); *Lightning Park*, 609 N.Y.S.2d at 906.

There was no relationship between the subject matter of Bialkin's (in 1980) and Skadden's (in 1989) prior representation of Ruskin and Skadden's later representation of UM&M in the reorganization case during 1996-97. In or around 1980, Bialkin, while a partner at another law firm, represented Ruskin with a group of investors in an attempt to acquire control of UM&M. *See* FA 116 (¶ 5). In addition,

8. UM&M was *not* litigating against Ruskin, but because Feldman had asserted a conflict, we assume, *arguendo*, that the higher standard applies here.

as previously disclosed by Skadden to the Delaware bankruptcy court on November 2, 1990, FA 126-132, Skadden, under the lead of Bialkin, had represented an investor group, including Ruskin, in their unsuccessful bid to acquire shares of UM&M in 1989. Skadden's retention as UM&M's bankruptcy counsel in the Delaware bankruptcy case was approved. Skadden also represented UM&M, Ruskin and at least one other person in December 1989, for the limited purpose of negotiating a release of certain claims made by two former UM&M shareholders. FA 129-130 (¶¶ 11-12). These three prior unrelated representations had long been a matter of public record, and had been promptly disclosed again by Skadden to the bankruptcy court, when discovered by Skadden's bankruptcy lawyers, in May and July 1996. FA 116(¶ 5); FA 124(¶ 4); AA 1095. Feldman complained, FA 174-85, but neither he nor anybody else sought Skadden's disqualification.

"Courts routinely find no substantial relationship when the prior representation concerned subjects unconnected to the case before the court." *In re Wingspread Corp.*, 152 B.R. 861, 865 (Bankr. S.D.N.Y. 1993) (citing Gary T. Lowenthal, *Successive Representation By Criminal Lawyers*, 93 Yale L.J. 1, 17 (1983)). Nor has Feldman ever shown that an unrelated matter has any "patently clear," "identical" or "essentially the same" relationship to the pending representation. *Lightning Park*, 609 N.Y.S.2d at 906; *Bennett Silvershein Assocs. v. Furman*, 776 F. Supp. 800, 803 (S.D.N.Y. 1991), citing *Government of India v. Cook Indus., Inc.*, 569 F.2d 737, 740 (2d Cir. 1978). *Accord In re Sullivan*, No. 91-5501, 1992 WL 68613, at *6 (E.D. Pa. Mar. 31, 1992) (affirmed bankruptcy court's denial of disqualification motion when trustee's counsel previously represented adverse party defendant; "representation . . . ended more than

four years prior to" bankruptcy; representation was "sporadic and related to isolated matters and . . . ended in 1989. . . . [S]uch relation is sufficiently remote . . . .").

C. Petitioner's Factual Misstatements

Pursuant to Supreme Court Rule 15.2, respondents bring to the Court's attention the following misstatements made by the Petitioner in his petition with respect to Issue No. 1: (1) contrary to Petitioner's assertion that there is a conflict among the Circuit Courts of Appeals, *see* Petition at 9, no such conflict exists; (2) there was no evidence in any of the courts below that Ruskin owned a "sham corporation", *see* Petition at 5; (3) Petitioner mischaracterizes Ruskin's testimony and the transaction involving the purchase of UM&M's stock. *See* Petition at 5, 8. Ruskin testified, and UM&M's filings with the Securities and Exchange Commission confirm, that the purchaser's debt was secured by the stock purchased, that Mr. Ruskin's guaranty was for a limited amount and did not cover the entire obligation under the purchase agreement. *See* AA 79-80; AA 89; AA 812; (4) contrary to Petitioner's assertion, *see* Petition at 8, UM&M's audited financial statements did not state that Ruskin owed UM&M $6 million for the purchase of UM&M stock; (5) Mr. Gelber's quote, *see* Petition at 5, is taken out of context. Mr. Gelber testified explicitly: "We represent the corporation. We felt we had no conflict in representing the corporation," and "I do not represent Mr. Ruskin. I represent the corporation." *See* FA 239 at 119-20; (6) contrary to Petitioner's allegation, *see* Petition at 5, neither Skadden nor Bialkin represented Ruskin at any time after 1989. *See* FA 239 at 59-60; FA 240 at 203, 205-06; AA 892-93; (7) the suggestion that Cook deliberately delayed disclosure, *see* Petition at 6, is absurd. The Bankruptcy Court explicitly

found that "the senior associate and partner in charge of the bankruptcy matter immediately took steps to make appropriate disclosures when such matters came to their attention." *See* AA 1095; (8) the Southern District of New York was an appropriate venue for these cases as the Bankruptcy Court explicitly held, *see* AA 1067 ("Mr. Ruskin's testimony shows that the filing of Victoria's petition in New York was a properly venued case and the filing was not fraud perpetrated on the Court."); (9) contrary to Petitioner's assertion that the Debtors failed to disclose the pendency of the Delaware bankruptcy case, *see* Petition at 7, 9, UM&M's bankruptcy petition clearly listed UM&M's Delaware bankruptcy case, *see* FA 95; (10) the conduct of Ruskin, Cook and Bialkin was anything but egregious, each has testified at length at the Bankruptcy Court, fully addressed all of the issues raised by the Petitioner, and was cross-examined by the Petitioner or his counsel. *See* FA 239 at 12-96 (Cook); FA 240 at 142-232 (Bialkin); AA 764-934 (Ruskin); AA 1055-1061 (Ruskin); (11) contrary to Petitioner's assertions, *see* Petition at 13, the Committee has advised the bankruptcy court that it commenced an investigation as to Feldman's alleged claims against Ruskin, that it intended to take an appropriate action if it determined that a viable cause of action exists, *see* AA 62-64 (¶ 22), and UM&M's Disclosure Statement explicitly states that the Committee conducted "its own internal review and analysis" relating to any alleged claims against Ruskin. *See* AA 375.

II.

SUBSTANTIAL CONTRIBUTION

Courts have developed fairly clear guidelines for substantial contribution awards. To show "substantial contribution," the applicant must confer a significant, demonstrable benefit upon the reorganization, in amount, value or worth. *Hall Fin. Group, Inc. v. DP Partners, L.P.* (*In re DP Partners, L.P.*), 106 F.3d 667, 673 (5th Cir. 1997); *Lebron v. Mechem Fin. Inc.*, 27 F.3d 937, 944 (3d Cir. 1994); *Haskins v. United States* (*In re Lister*), 846 F.2d 55, 57 (10th Cir. 1988) (same); *In re Best Prods. Co.*, 173 B.R. 862, 866 (Bankr. S.D.N.Y. 1994) (same).

The bankruptcy court found, based on the factual record before it, that "no such contribution was made by the applicants." AA 1073. In addition, the bankruptcy court found that "many of Mr. Feldman's efforts, such as the Trustee motion, caused an increase in the fees incurred by the Debtor's and the Committee's professionals. Some of Mr. Feldman's conduct was duplicative of the efforts of the Committee and the United States Trustee. . . ." *Id.* These factual findings are not clearly erroneous, were properly affirmed by the district court and the court of appeals, and therefore, present no issue for this Court's review. Fed. R. Civ. P. 52(a); *Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985).

CONCLUSION

Based on the foregoing, the respondents respectfully submit that the petition should be denied in all respects.

Respectfully submitted,

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